BUSINESS LAW SECTION

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JURISDICTION IN CYBERSPACE 2001: TRYING TO POUR NEW WINE INTO OLD FLASKS

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I. Introduction.

The Internet impacts in major ways upon questions of jurisdiction. Jurisdiction to prescribe laws and adjudicate disputes historically has been based on territorial principles: if a country found a person within its territory, it exercised jurisdiction over that person. The Internet, greatly diminishes the significance of physical location of the parties, because transactions in cyberspace are not geographically based. Moreover, the Internet alters the power balance between distributor and consumer, because consumers now have instant access to enormous amounts of information and highly sophisticated analytical tools. This affects the basis on which courts have analyzed the ability of consumers to make enforceable choices of law and fora.

The difficulties faced by courts in dealing with this new medium are acutely exemplified by the November 20, 2000, decision of a French trial court. Climaxing a series of earlier rulings by the same court, it ordered Yahoo! Inc. to put filtering systems in its U.S. website so as to prevent access by French residents to portions of the Yahoo! Inc. auction site on which persons offer to sell World War II memorabilia containing Nazi symbols.[1] In its initial ruling (May 22, 2000) the court had held that the U.S. website for Yahoo! Inc. was subject to French jurisdiction simply because it could be accessed from France.[2]

A similarly unfortunate decision had been issued in 1996 in the U.S. by a federal district court in Connecticut,[3] which has since been ignored or rejected by most other courts in the U.S. on the strength of the principle that accessibility of a website, standing alone, does not form a sound basis for jurisdiction over a non-resident.[4] Indeed, under doctrines which have become prevalent in most judicial interpretations in the U.S. and elsewhere, France could not have jurisdiction over Yahoo! Inc.'s auction website: the site is not located in France, is not targeted at France and, indeed, offers only a venue in which persons other than Yahoo! Inc. offer goods for sale. To cap the matter, Yahoo! Inc. has a subsidiary resident in France which complies with the French law forbidding sale of Nazi-related goods on its French website, namely Yahoo.fr.

Recent recommendations made by the American Bar Association's Jurisdiction in Cyberspace Project ("Jurisdiction Project"), discussed later, are in keeping with the new realities of the Internet. In a nutshell, the Jurisdiction Project recommendations would universalize the principle, recognized in most reported decisions, that a website merely by itself cannot support a claim of jurisdiction. (The recommendations would also dispel the myth that all consumers are unable to make informed and binding decisions on choice of law and choice of forum an issue not involved in the Yahoo! Inc. case.)

The aberrational French decision, unless reversed on appeal or uniformly rejected by other French courts could undermine the harmony and predictability of jurisdictional questions in cyberspace. Such harmony and predictability is crucial to the flowering of E-Commerce. As stated in the E.U. Commission's October 2000 proposal, "[d]ifferences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal [E.U.] market.[5]

II. Background.

A. Fundamental Jurisdictional Principles Under International Law.

International law limits a country's authority to exercise jurisdiction in cases that involve interests or activities of non-residents.[6] First, there must exist "jurisdiction to prescribe." If jurisdiction to prescribe exists, "jurisdiction to adjudicate" and, "jurisdiction to enforce" will be examined. The foregoing three types of jurisdiction are often interdependent and based on similar considerations.[7]

"Jurisdiction to prescribe" means that the substantive laws of the forum country are applicable to the particular persons and circumstances.[8] Simply stated, a country has jurisdiction to prescribe law with respect to: (1) conduct that, wholly or in substantial part, takes place within its territory; (2) the status of

persons, or interests in things, present within its territory; (3) conduct outside its territory that has or is intended to have substantial effect within its territory; (4) the activities, interests, status, or relations of its nationals outside as well as within its territory; and (5) certain conduct outside its territory by persons who are not its nationals that is directed against the security of the country or against a limited class of other national interests.[9]

Cutting across the foregoing international law criteria in the U.S. is a general requirement of reasonableness. Thus, even when one of the foregoing bases of jurisdiction is present, a country may not exercise jurisdiction to prescribe law with respect to a person or activity having connection with another country if the exercise of jurisdiction is unreasonable.[10] The net effect of the reasonableness standard is to require more close contact between a foreign defendant and the forum country than is required under constitutional due process.[11]

B. Fundamental Personal Jurisdictional Principles in Europe.

Although basis jurisdictional law is statutory in the E.U., in contrast to case law-based in the U.S., the results under both systems have much in common. It was not until the extraordinary orders issued by Judge Jean-Jacques Gomez of the Paris Tribunal de Grande Instance in the Yahoo! Inc. case that residents of the U.S. and other countries began to see dramatic differences potentially arising.

Under the Brussels convention,[12] specified acts by a domiciliary of a contracting country subject the actor to jurisdiction in that country. As will be seen from the later discussion of U.S. jurisdictional principles, these actions are similar to those upon which a U.S. court would rely to find specific personal jurisdiction.[13] (Outside of the Brussels Convention, France will assert jurisdiction whenever the plaintiff in a civil action is a French national.[14]) However, the Brussels Convention does not require "minimum contacts" between the forum and the defendant, as would be required in the U.S.[15] It permits assertion of jurisdiction over a defendant if conduct wholly outside the forum resulted in a tortious injury to the plaintiff within it.[16]

Matthew S. Yeo and Marco Berliri have offered an analysis and perspective on the problem of determining the governing law in E-Commerce transactions. They use the European Union as an example and compare three EU approaches to resolve conflicts.[17]

The first alternative is to simply permit the merchant to designate any law that has a substantial connection to the transaction. The problem is that the consumer may not know or be able reasonably to determine the consumer's rights under such law. The creates apprehension on the part of the consumer and may retard the growth of E-Commerce. The second alternative is to adopt the mandatory rules concept. The contract can specify the law that will apply to the transaction but would not trump mandatory consumer protection rules. This creates confusion and increases the cost of compliance because the merchant is required to be familiar with the mandatory rules of each jurisdiction.

The third alternative which the authors examined (and favor) is to harmonize national consumer protection laws. This would create a lower cost mechanism, similar to the model rules enjoyed by other areas of uniform law. Merchants would not have to learn the law of each jurisdiction and consumers would know their rights irrespectively of choice of law. Although harmonization is a monumental task, this is the only present low cost solution.

In the E.U. context, the E.U. Commission has recommended that jurisdiction should generally be based on the defendant's domicile, but that alternative jurisdictional grounds should be available if there is a "close link" between the court and the action or if the "sound administration of justice" would be facilitated.[18] The jurisdiction of the domiciliary country would continue.[19] The place of performance shall have jurisdiction over contract actions.[20] In tort actions, jurisdiction lies in the place "where the harmful event occurred or there is a risk of it occurring.[21]

C. Fundamental Personal Jurisdictional Principles in the United States.

Traditionally, there are two types of personal jurisdiction which state courts may exert in the U.S.: "general" and "specific." Also relevant to cyberspace law is "in rem" jurisdiction. Another area that is technically not pure jurisdiction, but is closely related, involves the requirement to qualify as a foreign corporation to do business in a given state.

1. Qualifying To Do Business in a State.

California is like many of the United States in defining the transaction of "intrastate business" [in California] to mean "entering into repeated and successive transactions of its business in this state, other than interstate or foreign commerce."[22] A foreign corporation that transacts intrastate business in California must qualify with the Secretary of State.[23] Up to now, few E-Commerce companies have qualified to do business in states other than the state of their incorporation and the state of their principal office, if different from the place of incorporation. Thus, E-Bay, Yahoo!, Amazon.com and other large portals and online vendors have yet to qualify in other states, even though their websites are accessed daily thousands of times by residents of such states. Assumably, they take the position that all transactions other than in their home jurisdiction are in interstate commerce or that they are not engaging in business in any other state.[24]

2. General Jurisdiction.

General jurisdiction has been accorded less attention thus far than specific jurisdiction (*see* below) in the cases involving the Internet. It may gain importance as E-Commerce evolves. The criteria for application of general jurisdiction under constitutional due process limitations are very strict. Such jurisdiction can apply only if the defendant's contacts with the forum are "systematic" and "continuous" enough that the defendant might anticipate defending any type of claim there.[25] General jurisdiction can extend to a nonresident defendant whose contacts with the forum state are unrelated to the particular dispute in issue.

3. Specific Jurisdiction.

Under U.S. law, a given forum has specific jurisdiction over a defendant whose contacts with the forum relate to the particular dispute in issues. (In the E.U. context, "special jurisdiction" is analogous to U.S. specific jurisdiction.) In 1945, the U.S. Supreme Court held that personal jurisdiction over a non-resident defendant by a forum state requires only that "he have certain minimum contacts with it, such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[26] Existence of the required "minimum contacts" is determined under a three-part test: (1) the defendant must purposefully direct his activities or consummate some transaction with the forum state or a resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum and thereby invokes the benefits and protections of its laws; (2) the claim must be one arising out of or relating to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with "fair play and substantial justice," i.e., it must be reasonable.[27]

A leading example of "purposeful direction" in the context of more traditional media was found where Florida residents wrote and edited an article in the National Enquirer which defamed a California resident. The Enquirer had its largest circulation in California and was the focal point of both the story and the harm suffered. These factors led the U.S. Supreme Court to conclude that there was sufficient evidence that the defendants' actions were "aimed at California" and would be expected to have a potentially devastating effect on the California resident, hence the defendants could have reasonably foreseen being brought into court in California.[28]

The test of "purposefully availing" oneself of the privilege of conducting business in the forum can be met if a party reaches beyond one state to "create continuing relationships and obligations with citizens of another state."[29] For example, taken alone, a single contract between a resident of the forum state and an out-of-state party may not establish sufficient minimum contacts to support personal jurisdiction. However, if there are added contacts such as telephone calls and mail into the forum state, the total contacts can collectively form a basis for jurisdiction over the nonresident.[30]

4. In Rem Jurisdiction.

In rem jurisdiction involves jurisdiction over a thing rather than a person. Such jurisdiction gives the court the power to determine the rights of every person in the thing, such as issuing

a judgment of title to land. Following its decision in *International Shoe,* the U.S. Supreme Court in dicta in *Shaffer v. Heitner* imported fundamental fairness considerations into in rem cases.[31]

D. A Comparison of U.S. and European Approaches to Choice of Law.

1. Choice of Law Differences Generally.

If more than one country can, consistent with domestic and international law, assert prescriptive jurisdiction, the choice between the laws is determined by the forum's choice of law doctrine. However, the U.S. and Europe have demonstrated different approaches to this doctrine. In the U.S., more flexible approaches that analyze contacts between the forum and the dispute in issue, as well as examine policies that weight the interests of different fora in having their own law applied to particular issues in controversy have displaced earlier, rigid formulas.[32] Thus, Section 6 of the Restatement (Second) of Conflicts, followed by most American states, directs a court's attention, absent a statutory directive, to concerns similar to those found in Section 403 of the Restatement (Third) of Foreign Relations Law.[33]

In contrast, Europe, particularly Germany, favors a more formal approach that is similar to that applied some years ago in the U.S. Similar to Europe, Japan also focuses on where the place of the relevant act, without consideration of "various nexuses." For example, in tort cases the applicable law is that of the place where the facts giving rise to the claim arose, whereas in contract cases, absent party choice, the law of the place where the offer was dispatched governs.[34]

The American approach to torts is summarized in §145 of the Restatement (Second) of Conflict of Laws: the law of the state with the most significant relationship to the occurrence and the parties is to be applied, taking into account such factors as where the injury occurred, where the conduct causing the injury occurred, the home of parties, and the place where any relationship between the parties is centered.[35]

Under the U.S. approach to contracts, summarized in §§186-188 of the Restatement (Second) of Conflict of Laws, contractual choice of law clauses will control unless the selected forum has no substantial relationship to the parties or transaction and is not otherwise reasonable, or use of the chosen law would violate a fundamental policy of a forum with a materially greater interest in the issue than that chosen and whose law would have applied under §188 of the Restatement had there not been a contractual choice.

Under the Rome Convention, contractual choice of law clauses are generally enforceable, but not where the contract is entered into by a consumer or where only one country is connected to the issues in dispute; in the latter situation, the contract will not preclude use of that country's mandatory rules.[36] Thus, both the U.S. and European approaches embrace party autonomy as the basic rule, allowing contract parties to choose the law to be applied to contract disputes. However, both approaches allow significant exceptions, namely, public policy or absence of contact with the chosen law in the case of the U.S., and mandatory rules of the state of the consumer or the one with most significant contact, in the case of the Rome Convention.

When the parties have not expressly chosen the law to be applied to contract disputes, the Restatement §188 again provides that the law of the state with the most significant relationship to the issue should apply, taking into account where the contract was negotiated, entered into and to be performed, where the subject matter of the contract is and where the parties live.[37] Corresponding provisions of Article 4 of the Rome Convention provide that, absent contractual choice, the applicable law shall be that of the country with which the contract is most closely connected, which is presumed to be the habitual residence or principal place of business of the party who is to effect the performance characteristic of the contract. The Article also presumes that if the contract involves immovable property, the country where the property is located has the closest connection to it and that with respect to the carriage of goods, the most closely connected country is the carrier's principal place of business if it is also where the goods are loaded or discharged or the principal place of business of the consignor.

Under the E.U. Proposal, a person domiciled in one Member State may be sued in another Member State, in matters relating to a contract, in the place of performance, or in matters relating to tort, in the place where the harmful event occurred or there is a risk of it occurring.[38] This is not inconsistent with the U.S. approach.

2. Consumer Contracts and Differing U.S. and European Views on Choice of Law.

The differences between the European and American approaches regarding choice of law are most graphic where consumer disputes are involved. The principal difference arises from the contrast between Articles 5 and 7 of the Rome Convention regarding consumer contracts and mandatory rules, and the doctrine of the *Carnival Cruise Lines* case,[39] which permits the enforcement against consumers of reasonable choice of forum clauses even in a contract of adhesion. Article 5 of the Rome Convention does not enforce the waiver by consumers[40] of mandatory laws of their habitual residence designed for their protection, although a choice of law clause may apply different law to other aspects of the contract and dispute. If there is no choice of law clause, Article 5 provides that the law to be applied is that of the consumer's habitual residence, unless the contract is one for carriage (other than an inclusive contract for travel and accommodation) or for provision of services exclusively in another forum. The EU Proposal is similar to the Rome Convention; it provides that:

"The autonomy of the parties to a contract *other than an employment, insurance or consumer contract* to determine the courts having jurisdiction must be respected. Contractual clauses electing jurisdiction between parties with unequal negotiating strength must, however, be regulated." [Emphasis added]

The EU Proposal adds:

> "With particular regard to choice-of-jurisdiction clauses in consumer contracts, a review of the planned system will be conducted after the entry into force of this Regulation in the light of developments in non-judicial dispute-settlement schemes, which should be speeded up."

In the U.S., it is also possible for public policy to override choice of law in consumer contracts.[41] Nonetheless, the policy is invoked much more seldom than in Europe. As we recognize the dramatic change in power parameters between supplier and consumer that the Internet creates (*infra,* section IV), the notion that consumers cannot make valid decisions on choice of law and forum becomes less defensible. Indeed, even "default" rules that make the consumer's residence the proper forum for disputes arising from a retail transaction need reexamination.

III. The Effects of the Internet On Traditional Principles of Jurisdiction.

A. Impacts Arising out of the Internet As It Exists in December 2000.

Basic principles have been essentially geographically based and have therefore been difficult to apply in the context of the Internet. A website can be viewed from any place in the world where there is access to the Internet. As a result, geographical location has less significance than previously in the context of jurisdiction. Information over the Internet passes through a network of networks, some linked to other computers or networks, some not. Not only can messages between and among computers travel along much different routes, but "packet switching" communication protocols allow individual messages to be subdivided into smaller "packets" which are then sent independently to a destination where they are automatically reassembled by the receiving computer.[42]

The actual location of computers among which information is routed along the Internet is of no consequence to either the providers or recipients of information, hence there is no necessary connection between an Internet address and a physical jurisdiction.[43] Moreover, websites can be interconnected, regardless of location, by the use of hyperlinks. Information that arrives on a website within a given jurisdiction may flow from a linked site entirely outside that jurisdiction.[44] For example, one packet of an e-mail message sent from California may travel via telephone line through several different states and countries on its way to Italy. Part of the "trip" may even go through a satellite in space. Meanwhile, another

packet of the same message may travel by fiber-optic cable, arriving in Italy before the first packet, with both transmissions are completed in nanoseconds. Finally, notwithstanding the Internet's complex structure, the Internet is predominately a passive system; Internet communication only occurs when initiated by a user.

B. Increased Conflicts Arising Out of Future Development of the Internet.

As earlier discussed, the rules of jurisdiction over activities on the Internet are evolving out of principles that predated the personal computer age. Repeatedly, courts and regulators have analogized the Internet to telephone or print media in analyzing jurisdictional issues. Whether this approach should continue in the future is a serious issue, because the Internet of today is but a glimmer of what lies ahead in digital communications.

1. Evolution of New Technologies Will Further Diminish Territoriality.

Not only is the new global marketplace incredibly complex, but the growth and pace of change in the communications industry are unlike anything since its inception. Each minute, millions of E-mail messages are being sent around the world. For decades, Silicon Valley was guided by Moore's Law, which states that the capacity of semiconductors will double every 18 to 24 months. But in 1999 the numbers started to change: *by 2001, the semiconductor industry is expected to add as much capacity as has been created in the entire history of the chip.* It is moving from producing chips to producing whole systems on a chip.[45]

Two other technologies which are pushing the expansion of information-carrying capacity are photonics and wireless. Photonics, which employs light to move communications, is doubling the capacity of optical fiber every 12 months. This is dramatically changing the way networks are deployed. Bandwidth (the amount of space available to carry the data and voice traffic that all these networks around us are building up) is also expanding exponentially. Instead of a resource in short supply, bandwidth may soon be an unlimited one.

Wireless is also fueling the communications revolution. While cell phones have gone from a curiosity to become commonplace, the real revolution will come when wireless broadband networks begin to serve as "fiberless" fiber to bring high-speed conductivity to places where it's too expensive or too difficult to lay fiber optic lines. Fixed wireless systems can now carry information about eight times more quickly than a computer's 56K modem. New technology will boost that capacity by another 10-20 times, opening up wide pipelines to carry voice, data, video and all of the pieces that comprise the growing network of networks. The system for creating, distributing, selling and consuming products is already turning upside down. Advertising, ordering, billing and trading are being swept into networks in an accelerating and ever-widening fashion. Five percent of all global sales will be occurring online as early as 2004.[46]

Add to the telecommunications revolution just described the new world of "bots." In Silicon Valley and elsewhere, more and sophisticated cyber-robots and other cyberagents are being developed. Bots with computerized artificial intelligence can be programmed with enormous amounts of information about the goals, preferences, attitudes and capabilities of their "cyber-principals." They can roam in virtual space without human intervention, endowed with such information and apply their artificial intelligence to conduct all manner of commercial, social and intellectual "transactions" with other bots and agents, day and night, while their principals are asleep or working on other things. Such bots in turn can appoint sub-agents, capable of speaking in multiple languages or ultimately communicating through a universal "computer-speak." Some expect that "an infinited number" of shopping bots will show up as electronic commerce expands, and that they will be able to respond to slight changes in Web-based auctions in a fraction of a second.[47] Indeed, competition to develop ever more sophisticated bots started for the first time in July 2000 in Boston.[48]

Thus, in contrast to the largely linear, point-to-point lines between buyers and sellers that have heretofore characterized traditional commerce and early E-Commerce, securities transactions (as well as other kinds of commerce) will increasingly occur outside of any geographical place, in a truly "virtual world," by highly programmed agents without human

intervention. For example, when a future investor engages in the use of Bots and other non-geographically based intermediaries it will be somewhat like the investor sending highly programmed, computer-driven spaceships into outer space to locate and "dock" at space stations for the purpose of conducting a transaction. It becomes harder to argue that the investor's home jurisdiction should control in preference to that of the space station operator or owner. The web participant who unleashes a bot into a digital environment awash with other Bots and virtual proxies arguably has "left" his geographical home, elected to transact in a different environment, and does not have a reasonable belief that the laws or courts of his home jurisdiction will apply. This makes it necessary to consider new, non-geographical or less geographical paradigms. These are discussed in Section IV below.

2. Technological Evolution Is Changing the Power Parameters.

The many existing jurisdictional rules applicable to commercial transactions reflect presumed power imbalances between buyers and sellers. Traditionally, sellers are thought to seek out buyers, manifesting their desire to benefit from a connection with the buyers forum, and to set the terms of the purchase contract.

However, power in the context of a commercial relationship depends upon knowledge and choice. Electronic commerce in the worldwide marketplace represented by the Internet inherently expands consumer choice, because it opens up every market to every buyer regardless of where the seller is located.**49** In the same vein, electronic commerce strengthens buyers *vis-a-vis* sellers because buyers gain more possibilities. Thus, the implied concern that buyers will be taken advantage of by sellers to whom they are tied by geographic or other limitations is less appropriate in the E-Commerce arena.

While the Internet empowers the consumer, it also can reduces the seller's power to define its market. In traditional commerce, a seller defines its market, almost always far narrower than global, by its advertising strategy and budget, its investment in distribution channels, the physical locations of its goods or service-delivery points, and by its processes for taking orders. In E-Commerce, absent substantial restrictive measures by the seller, every website is worldwide. As a result, a buyer is just as likely to search out a relatively passive distributor as an active distributor is to search out a passive consumer.

At the same time, inherently lower economic barriers to entry presented by E-Commerce already have resulted in smaller distributors transacting business beyond a single geographic location. While this trend has some precedent in the catalogue and telephone businesses, the scale by which the Internet can reduce costs is an entirely new phenomenon. All of these factors undermine the assumption that most distributors are more powerful than most consumers. In E-Commerce, indeed, many transactions may occur between very small enterprises and individuals. This suggests that the consumer law's concern with an imbalance in bargaining power may be less significant for Internet-based commerce.

The Internet also enables more buyers to purchase goods directly from the manufacturer. In the past, intermediaries such as distributors almost inevitably intervened between the manufacturer and consumers, adding cost to the transaction for what was often unclear added value. By making market pricing transparent, the Internet can substantially reduce the role of the merchant-intermediary.

Concededly, such a vast increase in sellers online can present consumers (and business buyers) with information overload and thereby negate the improved leverage otherwise generated by this new market structure. Moreover, the same database technologies that increase consumer choice can also help sellers more precisely target consumers, enabling sellers to trade on the fact of simple convenience. Nonetheless, technology may also address these problems.

Cyber-robots, or "bots," are an increasingly feasible technology that puts the buyer in charge of the buying decision. Bots, armed with great amounts of artificial intelligence, can be programmed with enormous amounts of information about the goods, preferences, attitudes and capabilities of their human "principals." They will then be able to roam in cyberspace without human intervention, endowed with such information, and apply their artificial intelligence to conduct all manner of commercial, social and intellectual transactions with

other bots. In turn, they can appoint sub-agents, capable of speaking in multiple languages or ultimately communicating through a universal "computer-speak."

3. The Changed Power Parameters Increasingly Impact the Issue of Contractual Choice.

Many disputes involving electronic commerce arise between parties who are bound by a contract determining the terms and conditions upon which they have agreed to interact. Frequently, the contract itself may provide that any dispute concerning it is to be heard in the courts of a specified state ("choice of forum" clause or "forum selection" clause) and is to be determined under the substantive law of a specified state ("choice of law" clause).**50**

If parties to the contract are presumed to have equal bargaining power and, therefore, an equal ability to accept or reject such clauses, the clauses are generally uncontroversial and enforced. However, equality between buyer and seller has not been presumed when one party to the contract is a consumer. Instead, the seller is assumed to define its market and set the terms of the contract for its own benefit. The buyer, in contrast, is assumed to be confronted with either (a) accepting the terms imposed by one of a limited number of sellers serving the buyer's market or (b) foregoing the purchase. In an attempt to protect the consumer from disadvantageous choice of forum and law clauses, the E.U. will enforce them only if they favor the consumer**51**, although in the U.S. they are enforced unless they are "unreasonable."**52**

An individual buyer still may not be able to negotiate the terms of sale, but the ability to scour the 'Net to find all available terms and prices for a product or service anywhere in the world empowers the buyer in ways that may surpass the benefits of negotiation. Absent the maintenance by the seller of an interactive site programmed to accept offers in compliance with its terms from any buyer, it is difficult to conclude that, by merely agreeing to sell something to a buyer located elsewhere, the seller ought to be subject to jurisdiction at the buyer's home. Indeed, it is at least arguable that the buyer has "targeted" the seller and ought to be answerable (for nonpayment, for instance) at the seller's home.**53**

To the extent that the Internet is both limiting the ability of a seller to confine its market and, consequently, dramatically widening the options available to buyers, the presumption of inequality in business-to-consumer transactions is called into question and, therefore, the policy reasons for refusing to enforce contractual choice of forum and law clauses in that context are correspondingly weakened.

IV. How United States Courts Apply Traditional Jurisdictional Principles to the Internet.

A. Jurisdictional Precedents Arising From Print, Telephone and Radio Cases.

From the onset, courts assessing Internet jurisdiction had precedents involving print, telephone and radio media to use in determining whether jurisdiction over specific activities offends constitutional due process. These precedents relate primarily to the intent with which the Internet is used. Thus, if an Internet-based news service were to send a number of messages specifically addressed to residents of a forum, there would be "purposeful direction" into the forum. Purposeful direction can exist on the 'Net even though, in contrast to shipment of some physical goods into a state as occurred in the National Enquirer Case (from which the shipper was deemed to foresee an effect in that state), nothing is shipped physically over the Internet.**54** E-mail over the Internet can be logically compared to traditional postal mail and to phone calls.

However, bulletin boards and websites are not directed to a place or even to a point in virtual space, in contrast to E-mail. The person who posts a bulletin board message knows that the message can be resent by others elsewhere in the world, but the posting person cannot control such redistribution. A website is even more of a passive medium, because it sends nothing specifically directed to the forum state. The site merely posts general information so viewers can log on to the site. As the cases have increasingly recognized, websites are similar to advertisements beamed to the world over television. Perhaps an analogy to the size of the National Enquirer's forum state circulation could be drawn from the number of hits on the website that emanate from viewers in a forum state. A site operator can identify the source of "hits" on his site; an operator of a website would therefore know whether a large proportion of the hits came from California. If information about a California resident were posted on the site, it could then be

argued under the National Enquirer Case rationale that the operator purposefully directed the information to California residents. However, this would be similar to basing jurisdiction over a telecast on the number of viewers in a given jurisdiction.

B. Specific Jurisdiction on the Internet.

1. Early Evolution of Internet Caselaw in the U.S..

The early cases involving jurisdiction over cyberspace in the U.S. were marked by inconsistencies and lack of proper analysis of the new medium. A graphic example was *Inset Systems, Inc. v. Instruction Set, Inc*.**55** Inset Systems sued Instruction Set ("ISI") in Connecticut (Inset's home) for trademark infringement. Even though ISI had no assets in Connecticut and was not physically transacting business there, the district court nonetheless determined that it had specific personal jurisdiction over ISI in Connecticut. It based its determination on ISI's use of a toll-free telephone number and the fact that there were at the time 10,000 Internet users in Connecticut, all of whom had the ability to access ISI's website. It found the advertising to be "solicitation of a sufficient[ly] repetitive nature to satisfy" the requirements of Connecticut's long-arm statute, which confers jurisdiction over foreign corporations on a claim arising out of any business in Connecticut.

What the Inset court failed to appreciate, just as the Paris court four years later, was that any website can be accessed worldwide by anyone at any time. Moreover, there was no evidence any Connecticut residents actually had accessed the site or made a toll-free call to ISI. Yet the court held that the minimum contact test of the due process clause of the Fourteenth Amendment was satisfied, reasoning that the defendant had purposefully "availed" himself of the privilege of doing business in Connecticut in directing its advertising and phone number to the state, where some 10,000 Internet service subscribers could access the website.**56** Under this line of reasoning, any website would be subject to jurisdiction everywhere just by virtue of being on the Web.

Fortunately, subsequent case law has shown most courts increasingly reluctant to grant jurisdiction merely on the basis of the number of potential customers in the forum jurisdiction who can access a passive website.**57** Indeed, as the number of cases involving jurisdictional issues has increased, courts have become more reluctant to find specific jurisdiction over a nonresident defendant, even if an accessible website is accompanied by a few other contacts with the site by residents of the forum. Internet-based jurisdiction has resulted more from the defendant's purposeful availment of the privilege of doing business in the forum jurisdiction or the defendant's purposeful direction of electronic communications to the forum jurisdiction.**58**

2. The Zippo and Cybersell Cases: the Sliding Scale of Online Interactivity.

In 1996, a federal court in Pennsylvania delivered the first decision in the United States setting out an overall analytical framework for specific personal jurisdiction based on Internet activity. The case is *Zippo Manuf. Co. v. Zippo Dot Com. Inc. ("Zippo").***59** Under *Zippo,* there is a "continuum" or sliding scale for measuring websites, which fall into one of three general categories: (1) passive, (2) interactive, or (3) integral to the defendant's business. The "passive" website is analogous to an advertisement in Time magazine; it posts information generally available to any viewers, who has no on-site means to respond to the site. Courts ordinarily would not be expected to exercise personal jurisdiction based solely on a passive Internet website, because to do so would not be consistent with traditional personal jurisdiction law.**60** An "integral" website is at the other end of the three categories. An integral site is used actively by a defendant to conduct transactions with persons in the forum state, receiving on-line orders and pushing messages directly to specific customers. In such cases, traditional analysis could support personal jurisdiction. The middle category, or "interactive" site, falls between passive and integral. It allows a forum-state viewer to communicate information back to the site. Under *Zippo,* exercise of jurisdiction in the "interactive" context is determined by examining the level of interactivity and the commercial nature of the site. Here a non-resident California defendant operated an integral website that had contracts with 3,000 Pennsylvania residents and Internet service providers, hence the court had no difficulty finding jurisdiction.

The first decision by a federal court of appeal involving specific jurisdiction in cyberspace was *Cybersell, Inc. v. Cybersell, Inc. ("Cybersell").*[61] Here, the Ninth Circuit, in contrast to the Connecticut federal court in the *Inset* case and the French trial court in the Yahoo! Inc. case, rejected the notion that a home page "purposely avails" itself of the privilege of conducting activities within a jurisdiction merely because it can be accessed there.[62] In *Cybersell*, the plaintiff was an Arizona corporation that advertised its commercial services over the Internet. The defendant was a Florida corporation offering web page construction services over the Internet. The Arizona plaintiff alleged that the allege Florida trademark infringer should be subject to personal jurisdiction of the Federal court in Arizona because a website which advertises a product or service is necessarily intended for use on a worldwide basis.

In finding an absence of jurisdiction, the Ninth Circuit used a *Zippo*-type of analysis without specifically adopting *Zippo.* First, the court articulated a three-part test for determining whether a district court may exercise specific jurisdiction over a nonresident defendant:

> "(1) The nonresident defendant must do some act or consummate some transactions with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in he forum, thereby invoking the benefits and protections[;] (2) the claim must be one which arises out of or results from the defendant's forum-related activities[; and] (3) exercise of jurisdiction must be reasonable."

Applying the foregoing principles, the Ninth Circuit concluded that the Florida defendant had conducted no commercial activity over the Internet in Arizona. Posting an "essentially" passive home page on the Web using the name "Cybersell" was insufficient for personal jurisdiction. Even though anyone could access defendant's home page and thereby learn about its services, that this fact alone was not enough to find that the Florida defendant had deliberately directed its merchandising efforts toward Arizona residents. Accordingly, defendant's activities over the Internet were insufficient to establish "purposeful availment." In so ruling, the Ninth Circuit observed that if all that were needed for jurisdiction was a Web page on the Internet, every complaint arising out of alleged trademark infringement on the Internet would be automatically result in personal jurisdiction wherever the plaintiff's principal place of business is located.

Cybersell is correct in its policy. First, in cyberspace as elsewhere, constitutional due process allows potential defendants to structure their conduct in a way to avoid the forum state.[63] At the same time, to assume that a website operator can entirely avoid a given jurisdiction is unrealistic; because the web overflows all boundaries, the only way to avoid *any* contact whatsoever with a specific jurisdiction would be to stay off the Internet.[64] For that reason, mere accessibility of a website should not properly be deemed to satisfy the Fourteenth Amendment minimum contacts requirements, and site operators should be able to structure their site use to avoid a given state's jurisdiction. As discussed below, this reality has been recognized by regulators in the United States under federal securities laws.[65]

Whether specific jurisdiction will be found and a site put in the "interactive" or "passive" category may turn more on a court's perception than on any real differences in the manner in which the user employs the Internet. Subsequent cases tend to support that observation, although the three-category method of analysis is not universally employed. Moreover, even many courts which invoke a *Zippo* analysis largely ignore the "integral" category and focus only on whether a site is "passive" or "interactive." Which of the two labels is used can often determine the jurisdictional issue.

3. Applying the "Effects" Test.

If the website operator intends to cause an effect in a given forum and actually does, he arguably avails himself of the privilege of doing business there in the same manner as occurred in the National Enquirer case. For example, a non-resident of California allegedly operated a scheme consisting of registering exclusive Internet domain names for his own use that contained registered trademarks.[66] The defendant allegedly demanded fees from Panavision, a well-known California resident, and other businesses that asked him to discontinue his unauthorized use of their trademarks. The Ninth Circuit affirmed a finding of

specific personal jurisdiction in California federal court over the defendant by the defendant's having committed a tort "expressly aimed" at California.[67] It reasoned that the defendant could foresee the harm done in California and therefore satisfied the minimum contact requirement.

4. Jurisdictional Issues in the Context of Securities Laws.

(a) Interpretations by the U.S. Securities and Exchange Commission ("SEC").

It will be recalled that, under international law, a country may assert jurisdiction over a non-resident where the assertion of jurisdiction would be reasonable. The standards include, among others, whether the non-resident carried on activity in the country only in respect of such activity, or whether the non-resident carried on, outside the country, an activity having a substantial, direct, and foreseeable effect within the country with respect to such activity. Under these rules, a court in one country could assert jurisdiction over a foreign company under the "doing business" or "substantial and foreseeable effects" tests where financial information is directed by E-mail into the country. The accessibility of a Website to residents of a particular country might also be considered sufficient to assert personal jurisdiction over an individual or company running the website.

In 1998 the SEC issued an interpretive release on the application of federal securities laws of the U.S. to offshore Internet offers, securities transactions and advertising of investment services.[68] The SEC's release sought to "clarify when the posting of offering or solicitation materials" on Websites would not be deemed activity taking place in the United States for purposes of federal securities laws.[69] The SEC adopted a rationale that resembles one adopted earlier by the North American Securities Administrators Association ("NASAA") in determining the application of state blue-sky laws.[70] Essentially, the SEC stated that it will not view issuers, broker-dealers, exchanges and investment advisers to be subject to registration requirements of the U.S. securities laws if they are not "targeted to the United States.[71]

Thus, the SEC generally will not consider an offshore Internet offer made by a non-U.S. offeror as targeted at the U.S. if (1) the Website includes a prominent disclaimer making clear that the offer is directed only to countries *other* than the U.S., and (2) the Website offeror implements procedures that are "reasonably designed to guard against sales to U.S. persons in the offshore offering."[72] There are several ways that an offer to non-U.S. locales can be expressed. The site could state specifically that the securities are not available to U.S. persons or in the U.S. Alternatively, it could list the countries in which the securities are being offered.

There are likewise several ways to guard against sales to U.S. persons. For example, the offeror could determine the buyer's residence by obtaining the purchaser's mailing address or telephone number (including area code) before sale. If the offshore party received indications that the purchaser is a U.S. resident, such as U.S. taxpayer identification number or payment drawn on a U.S. bank, then the party might on notice that additional steps need to be taken to verify that a U.S. resident is not involved.[73] Offshore offerors who use third-party Web services to post offering materials would be subject to similar precautions, and also would be have to install additional precautions if the third-party Website generated interest in the offering. The offshore offeror which uses a third-party site that had a significant number of U.S. subscribers or clients would be required to limit access to the materials to those who could demonstrate that they are not U.S. residents.[74]

Where the off-shore offering is made by a U.S. issuer, stricter measures would

be required because U.S. residents can more readily obtain access to the offer. Accordingly, the SEC requires a U.S. issuer to implement password procedures by which access to the Internet offer is limited to persons who can obtain a password to the Website by demonstrating that they are not U.S. citizens.**75** If Internet offerings are made by a foreign investment company, similar precautions must be taken not to target U.S. persons in order to avoid registration and regulations under the 1940 Act. From a practical standpoint, the SEC's historical reluctance to allow foreign investment companies to register under the 1940 Act means that foreign investment companies can only make private placement in the U.S.**76** When an offer is made offshore on the Internet and with a concurrent private offer in the U.S., the offeror must guard against indirectly using the Internet offer to stimulate participants in the private U.S. offer.**77**

The SEC's interpretation requires a broker-dealer which wants to avoid U.S. jurisdiction to take measures reasonably designed to ensure that it does not effect securities transactions with U.S. persons as a result of Internet activity. For example, the use of disclaimers coupled with actual refusal to deal with any person whom the broker-dealer has reason to believe is a U.S. person will afford an exemption from U.S. broker-dealer registration as suggested in the SEC interpretation, a foreign broker-dealer should require potential customers to provide sufficient information on residency.

By like token, the SEC will not apply exchange registration requirements to a foreign exchange that sponsors its own Website generally advertising its quotes or allowing orders to be directed through its Website so long as it takes steps reasonably designed to prevent U.S. persons from directing orders through the site to the exchange. Regardless of what precautions are taken by the issuer, the SEC will view solicitations as being subject to federal securities laws if their content appears to be targeted at U.S. persons. For instance, the SEC cited offshore offers that emphasize the investor's ability to avoid U.S. taxes on the investment.**78**

(b) U.S. Blue-Sky Administrators.

The Internet from the onset posed an issue whether offerings posted on a Website without more might be subject to the blue-sky law of every state in the U.S. from which they were accessible. Certainly, whether an Internet offer "originates" from a given state should not be based on the physical location of the essentially passive circuits carrying the message. Regardless of the multiplicity of networks and computers that an electronic message may traverse, the place where information is entered into a Website or into E-mail is the point of origination. Whether an Internet-based offer to buy or sell is "directed" into a given state is a more complex factual inquiry. If an offer to sell securities were mailed or communicated by telephone to a person in a forum state, personal jurisdiction in that state should apply.**79** By like token, an E-mail offer by Internet directly to the a resident of a state would similarly constitute a basis for jurisdiction in that state. So would acceptance by an out-of-state issuer of an E-mail from person in the forum state, subscribing to a general offering posted on the World Wide Web.

NASAA recognized early on that mere posting of the existence of an offering on the World Wide Web, without more, is different. Standing alone, it constitutes insufficient evidence that the offer is specifically "directed" to persons in every state. NASAA became the first super-regulatory entity to adopt a jurisdictional policy that would facilitate electronic commerce in securities. Under its model rule, states will generally not attempt to assert jurisdiction over an offering if the website contains a disclaimer essentially stating that no offers or sales are being made to any resident of that state, the site excludes such residents from access to the purchasing screens and in fact no sales are made to residents of

that state.[80]

As of mid-2000, 38 states had adopted a version of the NASAA safe-harbor, either by statute, regulation, interpretation or no-action letter.[81] Commonly, the disclaimer is contained in a page linked to the home page of the offering. A preferred technique is to request entry of the viewer's address and ZIP code before the viewer is allowed to access the offering materials. If the viewer resides in a state in which the offering has not been qualified, access is denied. Of course, the viewer might choose to lie, but it can be argued with some logic that a website operator cannot reasonably "foresee" that viewers would lie.

NASAA also adopted in 1997 a practical approach to jurisdiction over Internet-based broker-dealers and investment advisors.[82] NASAA's policy exempts from the definition of "transacting business" within a state for purposes of Sections 201(a) and 201(c) of the Uniform Securities Act those communications by out-of-state broker-dealers, investment advisers, agents and representatives that involve generalized information about products and services where it is clearly stated that the person may only transact business in the state if first registered or otherwise exempted, where the person does not attempt to effect transactions in securities or render personalized investment advice, uses "firewalls" against directed communications, and also uses specified legends.[83] NASAA's approach should facilitate the use of the Web by those smaller or regional securities professionals who focus their activities in a limited geographical area.

C. General Jurisdiction on the Internet.

Given its strict requirements, it is not surprising that to date there has been no finding of general jurisdiction based solely on advertising on the Internet.[84] While general jurisdiction has not been based on any reported decision solely upon the operation of a website, some courts have used only little additional activity as a crutch to support a general jurisdiction finding. One Texas case found general jurisdiction over the manufacturer of a bunk bed in a wrongful death action involving a three year old child where the manufacturer's website allowed customers to shop online, check status of purchases and contact sales representatives, and where the manufacturer had 3.2% of its sales in Texas.[85] This volume might have been insufficient for general jurisdiction in some other courts. For example, the Eastern District of Virginia has rejected general jurisdiction, even though sales in the state by defendants were close to $4 million in the prior three years, and defendant had a website that was interactive.[86]

D. In Rem Jurisdiction Over Internet "Property."

As noted earlier, in rem jurisdiction requires that fundamental fairness be satisfied.[87] In *Porsche Cars North America, Inc. v. Porsche.com* ("Porsche"), a federal district court declined to exercise in rem jurisdiction over 128 registered Internet domain names, citing Supreme Court dicta for the proposition that "courts generally cannot exercise in rem jurisdiction to adjudicate the status of property unless the due process clause would have permitted in personam jurisdiction over those who have an interest in the res."[88] Thereafter, in passing the Anticybersquatting Consumers Protections Act ("ACPA") in 1999, Congress specifically made in rem proceedings available in cases involving cybersquatting, if the owners of alleged infringing websites could not be found within the plaintiff's jurisdiction.[89]

Passage of the ACPA led the Fourth Circuit in June, 2000 to vacate the district court's order dismissing the case in Porsche, in order that the result could be revisited in the context of ACPA.[90] The same district court subsequently held that the in rem provisions of the ACPA were constitutional, ruling that the U.S. Supreme Court's analysis only required sufficient minimum contacts in those in rem actions where the underlying cause of action is unrelated to the property located in the forum.[91] However, if in personam jurisdiction over a defendant is available in the forum, an in rem action under ACPA will not be available.[92]

V. Future Directions and Recommendations.

A. The Yahoo! Inc. Case: An Aberration or a Seismic E.U. Shift?

As discussed earlier, a French court this year took jurisdiction over Yahoo! Inc., a corporation located in Santa Clara County with no presence in France, to adjudicate a complaint of French residents that they could access the Yahoo! auction site on which Nazi memorabilia were being offered for sale.**93** The complaint also was brought against Yahoo! France, Yahoo! Inc.'s French subsidiary, which is located in France, is in the French language and targets the French audience.

The case was filed in April, 2000.**94** A spokesman for one of the two plaintiffs, Ligue Internationale contre le Racisme, et l'Antisémitisme ("LICRA"), said there were more than 1,000 Nazi-related items (pictures, coins flags, etc.) available on the auction site.**95** When the Paris court first ruled on May 22, 2000 that Yahoo! Inc. was required to block access to such sites in France, where sales of such material are illegal, it gave Yahoo! Inc. two months to develop a plan for such selective blocking. It subsequently extended this date in order to hear testimony from experts on the technical feasibility of such blocking. The French judge rejected the argument of Yahoo! Inc. that such screening technology does not exist; rather, the judge asserted, it merely does not work very well at the moment.**96** Although the auction links were then removed from the Yahoo! France site, Yahoo! Inc. declined to block French access to its U.S. web portal or put warning messages on its U.S. site.

Interestingly, in a different case, triggered by a neo-Nazi website carried by a French Internet service provider, a Nanterre court declined to order the company to tighten its controls on future sites. The court said that service providers had no legal obligation to investigate the identity of their clients. The provider, Multimania, had already closed down the site after a complaint in February. It should also be noted that the U.S. Supreme Court ruled in May, 2000 that an Internet service provider bore no responsibility for the material it carried, and that a court in Munich last year overturned the conviction of the former head of CompuServe in Germany for aiding and abetting the spread of child pornography.**97**

The French decision, if followed by other courts, could make material in a foreign language and not specifically aimed at the population of another country actionable under that country's laws, simply because it is available there. For instance, as pointed out by Yahoo!'s general counsel, John Place, Muslim countries could entertain lawsuits and award damages against French websites, such as "Moulin Rouge," featuring nudity that constitutes a crime in those countries.**98** In the words of Florent Latrive, a writer for *Liberation on the Internet,* "[t]his lawsuit marks a watershed -- the internet -- a space with no boundaries, where one could read the writings of anyone in the world, -- is under threat."**99** Latrive goes on to predict that the type of reasoning used by the French court will gradually transform the Internet into a rough network of nationalities and jurisdictions, and that a mere click on a mouse may prompt a demand for identity papers before a viewer is allowed to proceed.**100** This would surely chill E-Commerce.

It is interesting to compare the result in Paris with a recent U.S. federal district court ruling in July 2000 also involving jurisdiction over an auction site. There, the Eastern District of Michigan held that the sale by a Texas resident of allegedly infringing items on eBay's Internet auction site to Michigan residents did not create personal jurisdiction in Michigan over the Texas resident.**101** In stark contrast to the Paris court, the court in Michigan refused to broadly hold that the mere act of maintaining a website that includes interactive features ipso facto establishes personal jurisdiction over the sponsor of that website anywhere in the United States. The Michigan plaintiff was a Michigan company that made and sold craft patterns for decorative figures such as reindeer and Easter bunnies. The defendant, a Texas resident who made and sold her crafts almost exclusively in the Houston area, also had an Internet website. She occasionally made mail-order purchases of the plaintiff's patterns and used them to make crafts sold to the public. In 1999, she sold to Michigan residents over the eBay auction site some craft goods based on the plaintiff's designs.

After the plaintiff sued in Michigan for copyright infringement, the defendant moved to dismiss for lack of personal jurisdiction, asserting that she never transacted any business in Michigan, never been to the state, and never owned or maintained any property there. In granting dismissal, the court found that plaintiff had failed to show the "minimum contacts" required under International Shoe. The court ruled that, merely by listing her craft goods for sale on eBay, defendant did not target Michigan residents and that Michigan residents simply happened to be the winning bidders in those auctions. Since defendant had no control over who was the highest bidder, she could not have purposefully availed herself of the privilege of doing business in Michigan. The court reasoned that her sales were random and attenuated.

The Michigan court also addressed the *Zippo* "sliding scale," noting that under *Zippo,* defendant's site would be a hybrid "middle ground" or "interactive" site. The court expressed concern over the lack of clarity

under *Zippo* as to the proper means of measuring a site's level of interactivity in guiding personal jurisdiction and questioned the need for a special Internet-focused test for minimum contacts. It found that the ultimate question still had to be answered by determining whether the defendant had sufficient "minimum contacts" in the forum state: "The manner of establishing or maintaining those contacts, and the technological mechanisms used in doing so, are mere accessories to the central inquiry." The court also faulted the failure of plaintiff to show that the defendant's site resulted in the development of any customer base in Michigan to warrant personal jurisdiction. It expressed the view that even under *Zippo,* the nature and quality of the asserted contacts are more important than the quantity of contacts. To the court, the fact that the site may have been "interactive" implied nothing about the extent of defendant's involvement with Michigan as a specific forum for any of her business. Even if all commercial websites could be accessed from anywhere a computer is connected to the Internet, the judge found a lack of evidence as to the level of interactivity or how such a level might compare with one who actively does business with Michigan residents: "Without such indications of active (or perhaps 'interactive') efforts to secure customers in the forum state through her website, the use of the Internet alone is no more indicative of local jurisdictional contacts than an isolated advertisement in a nationally-distributed magazine."

B. Possible Approaches to Jurisdictional Criteria.

It is important to promote Internet use in E-Commerce to gain all the benefits of individual empowerment, broader markets, speed price transparency and other efficiencies that it can offer. In the future, we may find that our jurisdictional models are inadequate for the dramatic changes in how business is and will be done. Traditional tests should therefore be reexamined.

1. The Direction Test.

One trend in jurisdiction cases has been to focus on the place where information on securities is *directed.* The question is whether this approach will fit the Internet down the line, where highly sophisticated robots will be moving through a wholly non-geographic virtual "space" to both communicate and transact business, frequently with other robots, and without human intervention.

For a purchaser (or seller) an investor to engage in the use of robots and other non-geographically grounded intermediaries is somewhat like sending a note in a bottle out to sea: it becomes harder to argue that the note writer's home jurisdiction should control in preference to the residence of whoever picks up the note or the place where it is picked up. By like token, a web participant who unleashes a bot into a digital environment awash with other robots and virtual proxies has voluntarily "left" his or her geographical and elected to travel and transact in a wholly different environment. It is harder to argue that such a person can have a reasonable belief that the laws or the courts of the home jurisdiction will apply.

Perhaps the "Zippo" horizontal continuum will need another dimension in the future.**102** The test might not be based solely on the "passive-interactive" gradations of Zippo, but might also include a vertical component, based on how far the entire process is removed from direct human involvement. For example, processes involving cyber-robots are more likely to be removed from direct human involvement and arguably should be scrutinized differently. Because of the sophistication of the environment in which the bots operate, jurisdiction should be highly consensual, i.e., affected by any and all click-wrap terms or conditions imposed or accepted by the bots. In the absence of click-wrap acceptance, an activity by a bot representing someone in Forum A should not necessarily establish jurisdiction in Forum A when the bot deals with another bot in Forum B. This would, in a way, be the obverse of the stream of commerce theory: a person who sends a bot into the Internet world can be deemed to foresee that, absent understandings to the contrary, it would be engaging in transactions that subject the person to the laws and courts of foreign jurisdictions.

2. Aspects of "Targeting".

Applying traditional principles of securities jurisdiction, jurisdiction is being extended to persons who use the Internet to "target" residents of a given jurisdiction. Along with access to information, other factors that may apply include:

(a) Specific Transactions Directed to the Jurisdiction.

Under current cases, when a person located outside a given jurisdiction uses a website to conduct transactions with residents of that jurisdiction, the website operator has "availed" itself of the jurisdiction and should reasonably expect to be subject to its courts in matters relating to the transactions. However, the intercession of a bot dealing with other bots and avatars in cyberspace is not necessarily "availing" itself of a jurisdiction.

(b) Push Technology.

The conscious "pushing" of information into a given jurisdiction, whether by a bot or any other complex of agents, should probably still be viewed as targeting activity that warrants specific jurisdiction in the location of the "pushee."

(c) Language.

The selection of language on which information is cast can also be relevant to the "targeting" issue. At present, approximately 80% of Internet communication is conducted in English (even though that may be expected to decrease over time).**103** This, together with the fact that English is the standard commercial language, make its use on a website insufficient ordinarily to establish jurisdiction of an English-speaking country. However, an Internet offering in Tagalog may arguably be considered to be targeted at Philippines investors, just as securities offerings in Dutch on the Internet are considered by Dutch securities regulators to be offered to residents of the Netherlands.

Again, bots alter the equation. A robot need not communicate in any human language, and indeed could be programmed to communicate in *every* principal language. Thus, languages other than English become less evidence of targeting.

(d) Currency.

When the offering price of securities is quoted in a currency other than that of the issuer's place of incorporation, this is arguably some evidence of "targeting." Currencies such as the E.U. are intended to be generic and should not be evidence, taken alone, of targeting any jurisdiction. Nor should widely-used currencies be seen, taken alone, as evidence of targeting. For example, U.S. dollars are almost akin in their pervasiveness to the use of English on the Internet. Pounds Sterling and Swiss Francs are likewise universal currencies. If an offer is expressed in Spanish Pesetas and available in Spain, Spanish law should arguably apply. On the other hand, an offering expressed in Spanish Pesetas and accessed in Italy would probably not be deemed directed to Italian offerees.

However, as bots and agents can change the significance of this factor as well. They will be able to translate one currency into another in a nanosecond, making currency identification less of a significant factor.

(e) Tax and Special Laws.

If Internet securities information which goes into detail on the tax laws or other laws of a particular nation could be deemed targeted to that particular audience. . . . by pointing out that, regardless of the precautions adopted, if the content appeared to be targeted to the U.S. (*e.g.,* by a statement emphasizing the investor's ability to avoid U.S. income tax on the investments) then it would view the website as targeted at the U.S. Arguably, the intervention of bots and agents would not affect this factor.

(f) Pictorial Suggestions.

A French Franc denominated offering made on a background of the Eiffel Tower might be said to be aimed at French investors. But can they be said to

be aimed at a French investor's multilingual bot? The answer would depend on how nearly the bot's information system was programmed to include the principal's patriotic sensibilities.

(g) Disclaimers.

Disclaimers are already a regular part of international paper-based securities offerings. While typically lengthy with respect to U.S. securities laws, disclaimers are often much shorter and less specific for other jurisdictions and may amount to no more than a statement that an offer is not made in any jurisdiction in which it would be illegal to make an offer unless registered. The SEC Release comments: "The disclaimer would have to be meaningful. For example, the disclaimer could state, "This offering is intended only to be available to residents of countries within the European Union." Because of the global reach of the Internet, a disclaimer that simply states, "The offer is not being made in any jurisdiction in which the offer would or could be illegal," however, would not be meaningful. In addition, if the disclaimer is not on the same screen as the offering material, or is not on a screen that must be viewed before a person can view the offering materials, it would not be "meaningful."**104**

The proliferation of bots could actually make the use of disclaimers even more meaningful. Common types of software protocols could efficiently screen out properly-programmed bots before they even accessed a screen. Acting sort of like a long-range radar, the disclaimers would deter certain bots from even approaching certain areas of cyberspace.

3. The "Effects" Test.

As discussed earlier, courts have applied the "effects" test in cyberjurisdictional cases when the conduct can be found to have an intended impact in the forum (*e.g.,* the *Panavision* case). Perhaps in the future, as the use of bots and other agents increases, courts should require clear and convincing evidence of an intended impact before making a foreign entity subject to forum jurisdiction. Just because there *is* some effect does not necessarily mean that effect was actually intended, when a piece of data can be circulated millions of times over in a matter of seconds.

C. The "Jurisdiction Project" of the American Bar Association: London 2000.

1. The Jurisdiction Project Finds the Power of the Consumer Vis-à-Vis the Supplier Has Increased.

In July 2000, after a two-year study, the American Bar Association ("Jurisdiction Project") presented an analysis and recommendations regarding jurisdiction in cyberspace.**105** The Jurisdiction Project Report stressed the change in power between buyers, intermediaries and sellers.

The Report noted that many jurisdictional rules as they are applied to commercial transactions reflect presumed power imbalances between buyers and sellers. The traditional concept on which much jurisdictional analysis is based is that sellers ordinarily seek out buyers (manifesting their desire to benefit from a connection with the buyers' forum) and to set the terms of the purchase contract. Those presumptions may well be subject to challenge, if not today, in the very near future.

First, the Internet generally empowers consumers vis-à-vis sellers, because power in a commercial relationship is directly related to knowledge and choice. The Internet expands choice by opening up every market worldwide to every buyer regardless of where the seller is located. A priori, therefore, electronic commerce strengthens buyers with respect to sellers because it opens up more possibilities for the buyer. Thus, the implied concern that buyers will be taken advantage of by sellers to whom they are tied by geographic or other limitations becomes less appropriate.

Moreover, the ability of the Internet to lower economic barriers to entry has in the past few years resulted in dramatic rise in the ability of smaller sellers to transact business beyond a single geographic location. Although not entirely different from catalogue and telephone businesses, the scale attainable on the Internet with lower costs presents an entirely new phenomenon. This phenomenon expands consumer choice and undermines the assumption that most sellers will be much larger than most buyers. In E-Commerce, many transactions may occur between very small enterprises and individuals. The consumer law's concern with an imbalance in bargaining power may be less significant for Internet-based commerce, because technology has substantially affected the leverage between buyer and seller. Market pricing is now transparent, and intermediaries and the costs they add to the product have become irrelevant.

The Jurisdiction Project Report also sees the advent of bots as adding further to the power of consumers:

> "An individual buyer still may not be able to negotiate the terms of sale, but the ability of the buyer's bots to 'scour' the global marketplace for available terms and prices for products or services empowers the buyer in ways that may surpass the benefits of negotiation. Absent clear targeting by the seller, it is difficult to conclude that, by merely agreeing to sell something to a buyer located elsewhere, the seller ought to be subject to jurisdiction at the buyer's home. Indeed, it is at least arguable that the buyer has 'targeted' the seller and ought to be answerable (for nonpayment, for instance) at the seller's home."**106**

2. The Jurisdiction Project Report Details How Critical It Is To Avoid Uncertainties in E-Commerce.

It is not simply a matter of reconciling sharply contrasting European and American approaches to choice of law; the question is whether characteristics of Internet transactions necessitate new approaches to choice of law, which have not been adopted under the pressure of earlier forms of commerce. The Internet makes things more complex. The argument over whether the law of the place origin or the law of the place of the consumer should be applied to E-Commerce disputes involving consumers becomes fuzzy as to actual location of a commercial Internet transaction: Where is a Web page located, where it is viewed, or on a client computer, or where the server transmitting the code is located? When is a transaction completed, when the server transmits a Web page, or when a client transmits the URL that automatically causes the page to be transmitted from a remote server?

The Internet's inherently global reach justifies special efforts to reduce uncertainty with respect to choice of law. As compared to pre-Internet modes of doing business, an Internet seller must undertake extraordinary steps to limit the reach of its solicitation of customers and receipt of customer orders; the Internet does not naturally associate either sellers or buyers with physical places. However, technology may be used to redress the jurisdictional issues raised by the technological efficiencies and global reach of the Internet. The existence and continuing development of super-intelligent Bots, which can be deployed by sellers and purchasers to evaluate the relative product, price and jurisdictional terms of the potential relationship, may provide a basis for a global standard, as long as the underlying legal "code" can be agreed upon.

3. Criteria for Determining Jurisdiction Made by the Jurisdiction Project Report.

The Jurisdiction Project Report arrived at certain recommendations regarding jurisdiction that recognize the new consumer power and the more level playing field. Among these are six jurisdictional "default" rules:

> (a) Personal or prescriptive jurisdiction should not be asserted based solely on the accessibility in the state of a passive website that does not target the state. (It is this rule that runs directly contra to the French court's ruling in the Yahoo! Inc. case.)
>
> (b) Both personal and prescriptive jurisdiction should apply to a website content provider or application service provider ["sponsor"] in a jurisdiction, *assuming*

there is no enforceable contractual choice of law and forum, if:

(i) the sponsor is a habitual resident of that jurisdiction;

(ii) the sponsor "targets" that jurisdiction and the claim arises out of the content of the site;**107** or

(iii) a dispute arises out of a transaction generated through a website or service that does not target any specific jurisdiction, but is interactive and can be fairly considered to knowingly engage in business transactions there.

(c) Consumers (purchasers) and sponsors (sellers) should be encouraged to identify, with adequate prominence and specificity, the jurisdiction in which they habitually reside.

(d) Sponsors should be encouraged to indicate the jurisdictional target(s) of their sites and services, either by: (a) defining the express content of the site or service, or listing destinations targeted or not targeted; and (b) by deciding whether or not to engage in transactions with those who access the site or service.

(e) Good faith efforts to prevent access by users to a site or service through the use of disclosures, disclaimers, software and other technological blocking or screening mechanisms should insulate the sponsor from assertions of jurisdiction.

(f) Personal and/or prescriptive and/or tax jurisdiction should not be exercised merely because it is permissible under principles of international law. Rather, the application of such jurisdiction should take into account:

(i) the interests of other states in the application of their law and the extent to which laws are in conflict;

(ii) the degree to which application of a state's own law will impede the free flow of electronic commerce;

(iii) whether the regulatory or tax benefits to be gained through the assertion of jurisdiction are sufficiently material to warrant the additional burden on global commerce that it will impose; and

(iv) principles recognized under national abstention doctrines, such as forum non conveniens, where the interests of justice or convenience of the parties or witnesses point to a different place as the most appropriate one for the resolution of a dispute.

As to contractual choice of law and forum, the following three principles should apply between buyers and sellers:

(a) Absent fraud or related abuses, forum selection and choice of law contract provisions could be enforced in business-to-business electronic commerce transactions.

(b) In business-to-consumer contracts, courts should enforce mandatory and non-binding arbitration clauses where sponsors have opted to use them, and should permit the development of a "law merchant," in exchange for:

(i) the sponsor's agreement to permit enforcement of any resulting final award or judgment against it in a state where it has sufficient assets to satisfy that award or judgment; and

(ii) the user's acceptance of an adequately disclosed choice of forum and choice of law clauses.

(c) Jurisdictional choices should be enforced where the consumer demonstrably bargained with the seller, or the choice of the consumer to enter into the contract was based on the use of a programmed consumer's bot[108] deployed by or on behalf of the consumer and whose programming included such terms as the nature of the protections sought, the extent to which such protections are enforceable and other factors that could determine whether the user should enter into the contract.

In addition, the Report would encourage "safe harbor" agreements, such as the one negotiated between the United States and the European Union in the context of personal data protection, as models for the resolution of jurisdictional conflicts in cyberspace, to the extent that they include a public law framework of minimum standards, back-up governmental enforcement, and the opportunity for a multiplicity of private, self-regulatory regimes that can establish their own distinctive dispute resolution and enforcement rules. Moreover, bots and other electronic agents could readily be employed to assist users to resolve jurisdictional issues by allowing such agents to communicate and/or compromise jurisdictional preferences preprogrammed by users. To do so, global protocol standards would have to be developed to allow such agents to operate universally.

4. Towards a Global Online Standards Commission.

Looking to the future, the ABA has proposed empanelling a multinational Global Online Standards Commission ("GOSC") to study jurisdiction issues and develop uniform principles and global protocol standards by a specific sunset date, working in conjunction with other international bodies considering similar issues.[109] The GOSC would, in addition to the principles enumerated earlier, follow these precepts:

(a) In the interests of encouraging the growth of electronic commerce on a fair, universal and efficient basis, governmental entities should be cautious about imposing jurisdictional oversight or protections that can have extra-territorial implications in cyberspace.

(b) Technological solutions, such as universal protocol standards, employed by intelligent electronic agents may be developed so that users and sponsors may electronically communicate jurisdiction information and rules (including rules relating to taxation), enabling such preprogrammed agents to facilitate the user's or sponsor's automated decision to do business with each other.

(c) In the interests of fairness, jurisdictional rules should be developed by and/or only after full consideration of the views of those who must abide by them and/or those substantially impacted by them.

(d) The creation of responsible, private sector, contract-based regimes to which local governments may defer can reduce jurisdictional uncertainty and be more readily adapted to the needs of electronic commerce.

(e) Global regulatory authorities of highly regulated industries, such as banking and securities, should reach agreement regarding either the uniform application of laws, rules and regulations to the provision of such products and services, or develop rules as to whose laws will be applied in an electronic environment.

(f) Any use of intermediaries (called "choke points" or private network junctures) in the flow of electronic information, commerce and money, such as internet service providers and payments systems, to regulate commercial behavior and to enforce jurisdictional principles impose significant, new legal burdens on those private entities and should require very careful exploration before being proposed for adoption. For example, tax authorities may attempt to increase their efforts to create, on a global basis, uniform rules for requiring tax assistance from non-resident providers of goods and services over the Internet, including efforts to encourage large and sophisticated providers of financial, credit or similar services to discharge a greater part of the burden of tax

assistance. Requiring such assistance is controversial. The E.U. recently proposed requiring foreign sellers of services delivered over the Internet to E.U. customers to charge the value-added taxes; the U.S. immediately protested.**110**

(g) Voluntary industry councils and cyber-tribunals should be encouraged by governmental regimes to continue developing private sector mechanisms to resolve electronic commerce disputes. Government-sponsored online cross-border dispute resolution systems may also be useful to complement these private sector approaches.

(h) Cyberspace may need new forms of dispute resolution-to reduce transaction costs for small value disputes, and to erect structures that work well across nation boundaries. The disputes resolution machinery established under ICANN rules to resolve trademark/domain name disputes is a promising example. Credit card chargebacks are another good example, which deserve elaboration for Internet E-Commerce.

(i) Cyberspace may need new forms of dispute resolution -- to reduce transaction costs for small value disputes, and to erect structures that work well across national boundaries. The disputes resolution machinery established under ICANN rules to resolve trademark/domain name disputes is a promising example. Credit card chargebacks are another good example, which deserve elaboration for Internet E-Commerce.

(j) The global benefits of reciprocal enforcement of judgments should be explored.

(k) Businesses consortia that can forge workable codes of conduct, rules and standards among a broad spectrum of electronic commerce participants may provide an efficient and cost effective jurisdictional model that governments can adopt and embrace.

D. Conclusion.

The recommendations and findings of the Jurisdiction Project confirm what the U.S. SEC and a number of others have observed: the Internet empowers consumers in ways not imagined previously. Moreover, the advance of bot technologies and other developments will further these powers. Perhaps it is time to reanalyze existing paradigms and create new rules that recognize the new realities.

More important, it is past time to develop common standards for E-Commerce throughout the globe. Not only should jurisdictional outcomes be as predictable as possible, they should be as uniform as possible.

ENDNOTES

1 Ordonne du 20 Novembre 2000, *VEJF and LICRA v. Yahoo! Inc. and Yahoo France* (Tribunal de Grand Instance de Paris). The French judge ruled that Yahoo! must put a three-part system in place that includes filtering by IP address, the blocking of 20 keywords and self-identification of geographic location. The system follows the recommendations of an expert panel appointed by the court to investigate such technologies, which revealed its findings earlier this month. Yahoo! will have three months to put the system in place, after which time the company would be subject to a fine of $13,000 a day if the system has not been implemented.

2 Ordonne du 22 Mai 2000, same case.

3 See notes 55-56, *infra* and accompanying text for discussion of Inset case.

4 See notes 57-62, *infra* and accompanying text.

5 Commission of the European Communities, Amended Proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Oct. 26, 2000) ["EU Proposal"].

6 RESTATEMENT (3RD) OF THE FOREIGN RELATIONS LAW OF THE U.S. §401, comment a (1987).

7 *Id.* 230-31.

8 *Id.* 236-37.

9 *Id.* §402.

10 *Id.* §403(1). In addition, §403(2) enumerates different factors which have to be evaluated in determining the reasonableness of assertion of jurisdiction: (1) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (2) the connections, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (3) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (4) the existence of justified expectations that might be protected or hurt by the regulation; (5) the importance of the regulation to the international political, legal, or economic system; (6) the extent to which the regulation is consistent with the traditions of the international system; (7) the extent to which another state may have an interest in regulating the activity; and (8) the likelihood of conflict with regulation by another state.

11 G. Born, *Reflections on Judicial Jurisdiction in International Cases,* 17 GA. J. INT. & COMP. LAW 1, 33 (1987); *see Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102, 115 (1987).

12 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Sep. 30, 1968), 1978 O.J. (L 304) 36 [**"Brussels Convention"**].

13 The Brussels Convention would find that performance of a contractual obligation in the country or occurrence of a tortious event there would be a basis for jurisdiction in the country. Brussels Convention, Title II, §2, art. 5.

14 Code Civil, Article 14 (Fr.).

15 See notes 23-24, infra, and accompanying text regarding the U.S.

16 Brussels Convention, Title II, §2, art. 5. E.U.

17 **http://pubs.bna.com/ip/BNA/EIP.NSF/b3e99e4adbdfc8cc85256480004f6e47/f916e63b1616fb7b85256706001efe99?OpenDocument**

18 E.U. Proposal, Preamble, point (11).

19 *Id.* at Ch. II, §1, art. 2

20 *Id.* at Ch. II, §1, art. 5(1)

21 *Id.* at Ch. II, §1, art. 2(3)

22 Cal. Corp. Code §191

23 *Id.* §2105.Compare §371, Del. Gen. Corp. Law. Engaging in business for purposes of the qualification requirement usually requires "some permanence and durability."

24 *See, e.g., National Union Indemnity Co. v. Bruce Bros.,* 44 Ariz. 454, 38 P.2d 648 (1934). Merely sending in agents is not enough. *Puritan Pie Co. v. Milprint,* 494 P.2d 850 (Colo. App. 1971).

25 *International Shoe Co. v. Washington,* 326 U.S. 310, 318 (1945) ("International Shoe") (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

26 *International Shoe,* 326 U.S. 310, 316 (1945).

27 *Core-Vent v. Nobel Industries AB,* 11 F.3d 1482, 1485 (9th Cir. 1993) (citing *Lake v. Lake,* 817 F.2d 1416, 1421 (9th Cir. 1987)).

28 *Calder v. Jones,* 465 U.S. 783, 789 (1984) (herein, the "National Enquirer Case").

29 *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 473 (1985) (quoting *Travelers Health Assn. v. Virginia, 3*39 U.S. 643, 647 (1950)). *See also McGee v. International Life Insurance Co.,* 355 U.S. 220, 222-23 (1957).

30 *Burger King Corp., supra*, 471 U.S. at 476. Once a nonresident has either purposefully directed activities to the forum state or has purposefully availed himself of the privilege of conducting activities in the forum, the question of fairness must be considered. The Supreme Court has articulated five separate "fairness factors" that may require assessment to determine whether or not specific jurisdiction should apply. These factors include:

1. The burden on the defendant of defending in the forum;

2. The forum state's interest in adjudicating the dispute;

3. The plaintiff's interest in obtaining convenient and effective relief;

4. The interstate judicial system's interest in efficient resolution of controversies; and

5. The shared interest of the states in furthering substantive social policies. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 292 (1980).

31 *Shaffer v. Heitner,* 433 U.S. 186, 204-106 (1977). The formal American approach is reflected in the First Restatement of Conflict of Laws.

32 The newer flexible approach is identified with Brainerd Currie and the Second Restatement of Conflict of Laws.

33 These include:

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Of the foregoing, needs of the interstate and international systems is most significant. Choice-of-law rules should seek to further harmonious relations between states and to facilitate commercial intercourse between them. In formulating rules of choice of law, a state should have regard for the needs and policies of other states and of the community of states. Rules of choice of law formulated with regard for such needs and policies are likely to commend themselves to other states and to be adopted by these states. Adoption of the same choice-of-law rules by many states will further the needs of the interstate and international systems and likewise the values of certainty, predictability and uniformity of result. Restatement (Second) of Conflict of Laws §6 cmt. d.

34 Tokushige Yoshimura, *Jurisdiction Research,* available at **http://www.kentlaw.edu/cyberlaw**.

35 The differences between the U.S. and European approaches are arguably more theoretical than real. The substantive law applied under modern contacts or interests analysis in the U.S. most frequently is the same law that would get applied under the doctrine of lex loci delicti. Under the purportedly formal European approach, questions regularly arise as to the where the harm occurred, for application of the tort choice of law rule.

36 *The Rome Convention on the Law Applicable to Contractual Obligations* (June 19, 1980), 80/934/EEC, 1980 O.J. (L 266) 1 ("Rome Convention"). A mandatory rule is defined as one that cannot be derogated from by contract.

37 If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§189-199 and 203.

38 EU Proposal, §2.

39 *Carnival Cruise Lines, Inc. v. Shute* 499 U.S. 585 (1991). Carnival Cruise Lines involved a forum selection clause in a consumer contract. Lower courts have extended its rule to choice of law clauses. *See, e.g., Haynsworth v. The*

Corporation, 121 F.3d 956, 965 (5th Cir. 1997).

40 Covered consumers are those who were solicited, either individually or through advertising, in their forum and who there completed steps necessary by them for the formation of the contract and those who traveled elsewhere to place an order for goods at the arrangement of the seller for that purpose.

41 Thus, *State ex rel Meierhenry v. Spiegel,* involved an action by South Dakota to recover interest charged by a nonresident seller which violated South Dakota's usury laws. The defendant, an Illinois-based mail-order enterprise, had offered credit sales through catalogues available in South Dakota. Because the credit agreements provided that they were to be governed by Illinois law, the trial court granted summary judgment for the defendant, ruling that the interest rates allowed by Illinois law, rather than those under South Dakota law, applied. The Supreme Court of South Dakota reversed, holding that the general rule, that parties to a contract may effectuate their own choice of law, was trumped by the public policy as expressed in the South Dakota usury statute, which made the provision of the credit agreement void. 277 N.W.2d 298 (S.D. 1979).

42 *See* stipulated facts regarding the Internet in *American Civil Liberties Union v. Reno,* 929 F. Supp. 824, 830-32 (E.D. Pa. 1996).

43 D. Johnson and D. Post, *Law and Borders-The Rise of Law in Cyberspace,* 48 STAN. L. REV. 1367, 1371 (1996).

44 The Internet also uses "caching," i.e., the process of copying information to servers in order to shorten the time of future trips to a website. The Internet server may be located in a different jurisdiction from the site that originates the information, and may store partial or complete duplicates of materials from the originating site. The user of the World Wide Web will never see any difference between the cached materials and the original. *American Civil Liberties Union v. Reno, supra,* note 17, 929 F. Supp. at 848-49.

45 *See* Carleton Fiorina, *The Communications Revolution,* Speech to Commonwealth Club of California, in COMMONWEALTH CLUB OF CALIFORNIA MONTHLY NEWSLETTER, July 19, 1999 [hereafter "Fiorina"]. One of the results will be to shrink the size and cost of an incredibly expanding range of communications devices. Bell Labs, for example, has a camera on a chip and a microphone on a chip. *Id.*

46 Fiorina.

47 *Id.*

48 *Id.*

49 Note that legal regulation may block some sellers from some markets.

50 Contract terms themselves, of course, also supply a set of substantive rules to govern the transaction, which will be used by a court unless they violate the public policy of the forum.

51 Italy, for example, provides that the choice of any forum other than the consumer's domicile is deemed unfair and, therefore, unenforceable unless the seller can demonstrate the existence of dealings over that clause with the consumer. Similarly, the choice of the law of a non-E.U. country is void if the chosen law is less favorable to the consumer and the contract's closest connection is to an E.U. country. *See* Emilio Tosi, *Consumer Protection under Italian Law,* available at **http://www.kentlaw.edu/cyberlaw/docs/foreign/**.

For a valuable discussion of these clauses and their treatment in Europe, *see* Gabrielle Kaufmann-Kohler, *Choice of Court and Choice of Law Clauses in Electronic Commerce,* in Vincent Jeanneret (dir.), Aspects Juridiques du Commerce Electronique, Zurich (Schulthess) 2000.

52 *Carnival Cruise Lines, Inc., supra,* note 36. However, individual states, when their law is applicable (*Carnival Cruise Lines* was an admiralty case, so federal law controlled), may as a matter of public policy refuse to enforce such clause. *See, e.g., Jones v. GNC Franchising, Inc.,* 211 F.3d 495 (9th Cir. 2000) (refusing to enforce Pennsylvania choice of forum clause against a California franchisee).

53 The change may also affect at least default rules respecting applicable law. In Switzerland, for example, a contract is subject to the law of the state with which it is most closely connected, presumed to be the ordinary residence of the party called upon to provide the characteristic performance, *i.e.* the seller. But to the extent that the buyer defines its purchase, activates delivery, etc., its control may surpass that of the seller, resulting in the use of the law of the buyer's residence. This assumes, of course, that the buyer utilizing a bot is still seen as the buyer; a bot might lack legal standing. *See* Meyer, Müller, Eckert, *ABA Cyberspace Jurisdiction Project,* available at

http://www.kentlaw.edu/cyberlaw/docs/foreign/ [hereinafter Meyer], at A and D. Art. 4 of Rome Convention also mandates use of the law of the country with which the contract is most closely connected, presumed to be the habitual residence of the party who is to effect the performance characteristic of the contract.

Such bots might also be seen as trespassing on third-party websites. The disruption such a result would cause is severe, since search tools in common use rely on accessing deep links. *See* 68 U.S.L.W. 1734 (2000).

54 *See* discussion of *Calder v. Jones* at note 28, *supra.*

55 937 F. Supp. 161 (D. Conn. 1996) (herein "Inset").

56 *Id.*

57 *See* cases in second half of note 58, *infra.*

58 Personal jurisdiction was found to exist in: *Archdiocese of St. Louis v. Internet Entertainment Group, Inc.,* 1999 WL 66022 (E.D. Mo.) ___ F. Supp. 2d ___ (1999) (operator of adult site intended to reach Missouri residents in connection with papal visit to St. Louis); *GTE New Media Services, Incorporated v. Ameritech Corporation,* 21 F. Supp. 2d 27 (D.C., D.C. 1998) (telephone companies increased advertising revenue by channeling District of Columbia viewers to their websites); *American Network Inc. v. Access America/Connect Atlanta, Inc.,* 975 F. Supp. 494 (S.D.N.Y. 1997). (Georgia Internet service provider sued in New York for trademark infringement had 7,500 customers worldwide, including six in New York who paid $150.00 per month in the aggregate, and defendant sent software and agreements to sign to new customers; court found "purposeful availment" in the New York forum); *Telco Communications v. An-Apple-A-Day,* 977 F. Supp. 404 (E.D. Va. 1997) (defendant's Web page along with the other contacts with Virginia held enough for jurisdiction over defendants, who posted allegedly defamatory press releases regarding plaintiffs on a passive Internet site); *Cody v. Ward,* 1997 U.S. Dist. LEXIS 1496 (D. Conn. Feb. 4, 1997). (California defendant's telephone and e-mail transmissions to a Connecticut plaintiff for the purpose of inducing the plaintiff to purchase securities was enough to exercise personal jurisdiction under Connecticut statute); *Telephone Audio Productions, Inc. v. Smith,* 1998 U.S. Dist. LEXIS 4101 (N.D. Tex. March 26, 1998) (although defendants' acts failed to rise to the level necessary for the court to have general jurisdiction over the defendants, they were sufficient for specific jurisdiction where defendants maintained a website to promote their business with a registered trademark owned by plaintiff; the web-page with the allegedly infringing mark was accessible to Texas residents and defendants used the infringing mark at a trade show in Texas and received orders from distributors in Texas, hence the combination of the website and other contacts with Texas were sufficient for jurisdiction); *Mieczkowski v. Masco Corp.,* 997 F. Supp. 782 (E.D. Tex. 1998) (nature of the manufacturer's website which had a "Shop Online" page, offering customers an opportunity to check the status of their purchases and providing for direct on-line communications with sales representatives, combined with other factors such as the volume of business conducted in the state, provided a basis for asserting *general* personal jurisdiction over a bunk bed manufacturer); *Clipp Designs, Inc. v. Tag Bags, Inc.,* 996 F. Supp. 766 (N.D. Ill. 1998) (Personal jurisdiction found in trade dress infringement action where defendant was alleged to have solicited orders for its locket tag protector in Illinois and advertised the device on its website and through a national magazine); *Bunn-O-Matic Corp. v. Bunn Coffee Service, Inc.,* 1998 U.S. Dist. LEXIS 7819 (C.D. Ill. March 31, 1998) (allegedly infringing marks used on defendant's passive website, which provided only general information, did not allow customers to place orders by accessing the site had no Illinois resident who accessed site for contest to obtain free coffee or used its toll-free telephone numbers and, other than its website, defendant did not advertise, sell or ship any of its goods or services in Illinois; nonetheless, defendant's actions in setting up a website accessible to residents of plaintiff's home state of Illinois held to meet the low threshold for jurisdiction where the defendant was on notice that its use of an infringing mark would cause injury to an Illinois resident); *Blumenthal v. Drudge,* 992 F. Supp. 44 (D.D.C. 1998) (personal jurisdiction in District of Columbia over Drudge, a California resident, based on: (1) interactivity of the website between defendant Drudge and D.C. residents; (2) the regular distribution of the "Drudge Report" via AOL, email and the World Wide Web to D.C. residents; (3) Drudge's solicitation of and receipt of contributions from D.C. residents; (4) the availability of Drudge's website to D.C. residents 24 hours a day; (5) Drudge's interview with C-SPAN in D.C.; and (6) Drudge's contacts with D.C. residents who provided gossip for his Drudge Report, which was distributed to subscribers by email, by Drudge's own website, and by *Hotwired* magazine and AOL, all adding up to a "persistent" course of contact with D.C.); *Heroes, Inc. v. Heroes Foundation,* 958 F. Supp. 1 (D.D.C. 1996) (Defendants' web-page, soliciting contributions and providing toll-free telephone number, and use of allegedly infringing trademark and logo, along with other contacts, resulted in "persistent" contact with the District of Columbia); *Hall v. La Ronde,* 1997 Cal. App. LEXIS 633 (August 7, 1997) (Court of Appeals held use of electronic mail and telephone to enter into contract with California resident and continuing relationship contemplated by such contract were sufficient to establish minimum contacts with California to support personal jurisdiction over New York defendant); *Hasbro Inc. v. Clue Computing Inc.,* 1997 U.S. Dist. LEXIS 18857 (D. Mass. Sept. 30, 1997) (Rhode Island website operator listed Massachusetts client on its site and which was accessible to Massachusetts residents); *CompuServe, Inc. v. Patterson,* 89 F.3d 1257 (6th Cir. 1996) (repeated transmission of

software and messages over the Internet to forum state); *Inset Systems, Inc. v. Instruction Set, Inc.,* 937 F. Supp. 161 (D. Conn. 1996); *Heroes, Inc. v. Heroes Foundation,* 41 U.S.P.Q.2d 1513 (D.D.C. 1996); *Maritz, Inc. v. CyberGold, Inc.,* 947 F. Supp. 1328 (E.D. Mo. 1996) (191 hits by Missouri viewers on California website constituted "purposeful availment"); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.,* 952 F. Supp. 1119 (W.D. Pa. 1997) (3,000 Pennsylvania subscribers to Internet news service constituted "purposeful availment"); *Panavision Intern, L.P. v. Toeppen,* 938 F. Supp. 616 (C.D. Cal. 1996), *aff'd,* 144 F.3d 1316 (9th Cir. 1998); *EDIAS Software Intern, L.L.C. v. Basis Intern, Ltd.,* 947 F. Supp 413 (D. Ariz. 1996) (defendant could foresee impact in the forum state of defamatory material on its website and e-mail sent into state); *Minnesota v. Granite Gate Resorts, Inc.,* 1996 W.L. 767432 (E. Minn. 1996) (contract provision that website operator could sue user of operator's services in user's home state); *Resuscitation Technologies, Inc. v. Continental Health Care Corp.,* 1997 W.L. 148567 (S.D. Ind. 1997) (although plaintiff initiated contacts with its website posting, subsequent extensive e-mail and phone contacts by Michigan defendants warranted Indiana jurisdiction); *California Software Inc. v. Reliability Research,* 631 F. Supp. 1356 (C.D. Cal. 1986) (messages placed by Vermont residents on web bulletin board defaming California business foreseeably caused damage in California).

Among an increasing number of cases declining to find jurisdiction are: *Chiaphua Components Limited v. West Bend Company,* 95 F. Supp. 2d 505 (E.D. Va., Norfolk Div. 2000); *Mid City Bowling Lanes & Sports Palace, Inc. v. Ivercrest, Inc.,* 1999 WL 76446 (E.D. La.), ___ F. Supp. 2d ___ (1999) (an advertisement on website held essentially "passive"); *Pheasant Run, Inc. v. Moyse,* 1999 WL 58562 (N.D. Ill.), ___ F. Supp. 2d ___ (1999) (advertisement on website containing defendant's telephone number); *Millenium Enterprises, Inc. v. Millenium Music, L.P.,* 1999 WL 27060 (D. Ore.), ___ F. Supp. 2d ___ (1999) (interactive website was not targeted at Oregon viewers and had no significant sales in Oregon); *Origin Instruments Corp. v. Adaptive Computer Systems, Inc.,* 1999 WL 76794 (N.D. Tex.) ___ F. Supp. 2d ___ (1999) (no jurisdiction where "moderate level" of interactivity); *ESAB Group, Inc. v. Cetricut, LLC,* 1999 WL 27514 (D.S.C.) ___ F. Supp. 2d ____; *Blackburn v. Walker Oriental Rug Galleries,* 1998 U.S. Dist. LEXIS 4517 (E.D. Pa 1998) (website illustrating various types of rugs sold by plaintiff was passive advertisement and hence without message by e-mail is not enough to demonstrate the nature and quality of the commercial activity in the jurisdiction more did not form continuous and substantial contacts with the forum sufficient for general jurisdiction hyperlink allowing readers to send); *Transcript Corp. v. Doonan Trailer Corp.,* 1997 U.S. Dist. LEXIS 18687 (N.D. Ill., Nov. 17, 1997) (in trademark infringement action, website was just a general advertisement accessible worldwide, with no particular focus on Illinois); *No Mayo-San Francisco v. Memminger,* 1998 U.S. Dist. LEXIS 13154 (N.D. Cal. 1998) (merely registering someone else's trademark as a domain name and posting it on a website not sufficient by themselves to subject a party in Hawaii to jurisdiction in California); *CFOS 2 GO, Inc. v. CFO 2 Go, Inc.,* 1998 WL 320821 (N.D. Cal. June 5, 1998) (defendant's website and e-mail addresses for communication over the Internet insufficient in trademark suit to establish that the defendant had purposefully availed itself of the privilege of conducting activities within plaintiff's home state, relying on *Cybersell*); *K.C.P.L., Inc. v. Nash,* 49 U.S.P.Q.2d 1584, 1998 WL 823657 (S.D.N.Y. Nov. 24, 1998) (court lacked personal jurisdiction over alleged cyberpirate who allegedly registered domain name for sole purpose of extorting money from plaintiff in exchange for the assignment of all rights in the name, where the defendant resided in California and had no contacts with New York whatsoever, and there were no allegations that defendant sought to encourage New Yorkers to access his site or that he conducted business in New York); *Conseco, Inc. v. Hickerson,* 698 N.E. 2d 816 (Ct. App. Ind. 1998) (Hickerson's use of Conseco's trademarked name in the text of its website not sufficient to support personal jurisdiction in Indiana over resident of Texas where mention of Conseco in website was made without any other contact with Indiana); *Patriot Systems, Inc. v. C-Cubed Corporation,* 21 F. Supp. 2d 1318 (D. Utah 1998) (although court determined that C-Cubed was transacting business with Utah by virtue of its license relationship with Folio, headquartered in Utah, and payment of royalties to Folio in Utah, there was insufficient nexus between the claims in the lawsuit and C-Cubed's other contacts with Utah for specific personal jurisdiction over the Virginia company; website was passive advertisement, merely providing information to those interested in it); *Edberg v. Neogen Corporation,* 17 F. Supp. 2d 104 (D. Conn. 1998) (defendant's website had hypertext links that permitted users to learn about Neogen products, order product information through an online catalog, e-mail specific comments or questions to or from Neogen representatives, and order products through a toll-free "800" telephone number; but there was no act purposefully directed towards the forum state, any evidence that anyone in Connecticut purchased any product of Neogen through its website or that any website advertisement of Neogen was directed to Connecticut); *Osteotech, Inc. v. Gensci Regeneration Sciences, Inc.,* 6 F. Supp. 2d 249 (D.N.J. 1998) (Internet advertisements and websites easily accessible from computers in New Jersey were insufficient proof by themselves of purpose availment in New Jersey, even with a phone number and e-mail address on the website); *Bancroft & Masters, Inc. v. Augusta National, Inc.,* 1998 U.S. Dist. LEXIS 22025 (N.D. Cal. 1998) (domain name dispute, website not enough for specific or general jurisdiction California); *Black & Decker (U.S.) Inc. v. Pro-Tech Power Incorporated,* 26 F. Supp. 2d 834 (E.D. Va. 1998) (patent suit, fact that defendants advertised their products on website accessible to Virginia residents and provided interested customers in Virginia with their e-mail addresses, not enough to show purposeful availment for personal jurisdiction); *Advanced Software, Inc. v. Datapharm, Inc.,* 1998 U.S. Dist. LEXIS 22091 (C.D. Cal. Nov. 3, 1998) (no jurisdiction over Datapharm in California where it had website with the domain name of datapharm.com and links to other pharmaceutical sites such as the FDA, offered visitors to the site the ability to send it e-mail by clicking on a hyperlink, listed Datapharm's address and provided an "800" telephone number); *3D Systems, Inc. v. Aarotech Laboratories, Inc.,* 160 F.3d 1373, 48

U.S.P.Q.2d 1773 (Fed. Cir. 1998) (no jurisdiction over parent of alleged patent infringer where it only maintained a website accessible by California residents that was merely passive and it did not purposefully direct any of its activities at California residents); *Cybersell Inc. v. Cybersell Inc.* (9th Cir. 1997) (mere accessibility by Arizona resident to passive, Florida-based website); *Bensusan Restaurant Corp. v. King,* 937 F. Supp. 295 (S.D.N.Y. 1996) (Missouri defendant based on a website advertising the defendant's nightclub; no evidence that sales were made or solicited in New York or that New Yorkers were actively encouraged to access the site); *Smith v. Hobby Lobby Stores, Inc.,* 968 F. Supp. 1356, 1365 (W.D. Ark. 1997) (no general jurisdiction where Hong Kong manufacturer of artificial Christmas tree advertised on the Web, but tree was purchased from a retailer in Arkansas); *McDonough v. Fallow McElligott, Inc., supra,* note 1 (mere accessibility of Missouri website by Californians insufficient for general personal jurisdiction); *Hearst v. Goldberger,* 1997 WL 97097 (S.D.N.Y. 1997) (no specific jurisdiction where New Jersey site was accessible to and visited by New Yorkers, where no sales of goods or services had occurred).

59 952 F. Supp. 1119, 1124 (W.D. Pa. 1996).

60 Only three reported cases to date have based personal jurisdiction essentially on website accessibility alone: (1) *Inset,* discussed earlier at notes 52-53 and accompanying text, and (2) *Telco Communications Group, Inc. v. An Apple A Day, Inc.,* 977 F. Supp. 404 (E.D. Va 1997). (Relying on *Inset* to hold that personal jurisdiction existed over defendant for defamation claim solely on basis of website which "could be accessed by a Virginia resident 24 hours a day"); *Bunn-O-Matic Corp. v. Bunn Coffee Service, Inc.,* 1998 U.S. Dist. LEXIS 7819 (C.D. Ill. Mar. 31, 1998) (although court said defendant was aware of impact of infringing mark on Illinois).

61 130 F.3d 414 (9th Cir. 1997).

62 *Id.* at 420.

63 *World-Wide Volkswagen, supra,* note 27, 444 U.S. at 296.

64 The use of filtering devices is theoretically possible, but the efficacy of these devices have not yet been proven. *See American Civil Liberties Union v. Reno, supra,* note 17, 929 F. Supp. at 844-46 (age filtering devices for sexually explicit materials under Community Decency Act); *CompuServe Inc. v. Cyber Promotions, Inc.,* 1997 WL 109303 (S.D. Ohio 1997) (CompuServe's attempts to set up filters to keep defendant from "spamming" (sending bulk junk e-mails) thwarted by defendant's falsifying the point of origin information on its e-mail and by configuring its network servers to conceal its actual domain name); *see also Bensusan Restaurant Corp. v. King,* 937 F. Supp. 295, 300 (S.D.N.Y. 1996).

65 *See* notes 68-83, *infra*, and accompanying text.

66 *Panavision Int'l, L.P. v. Toeppen,* 144 F.3d 1316 (9th Cir. 1998).

67 141 F.3d 1316 at 1321-22.

68 SEC Release No. 33-7516, (Mar. 23, 1998) ("Release 33-7516").

69 *Id.,* Part I. The release applied only to posting on websites, not to targeted kinds of communication such as e-mail.

70 *See* notes 80-83, *infra,* and accompanying text for NASAA approach.

71 Release 33-7516, Part I.

72 *Id.*

73 *Id.,* Part III.B.

74 *Id.,* Part III.D.

75 Id., Part IV.B.

76 *Id.,* Part V.

77 *Id.,* Parts IV.A., V.A.

78 *Id.,* Part III.B.

79 1 J. LONG, BLUE SKY LAW (1997 rev.), §3.04[2] at 3-26, 3-27.

80 Model NASAA Interpretive Order and Resolution, posted at NASAA's official Website, **www.nasaa.org/bluesky/guidelines/internetadv.html**.

81 *See* BLUE SKY L. REP. (CCH) 6481.

82 The policy is available on the Internet at **www.nasaa.org/bluesky/guidelines/internetadv.html**. *See also* Interpretive Order Concerning Broker-Dealers, Investment Advisers, Broker-Dealer Agents and Investment Adviser Representatives Using the Internet for General Dissemination of Information on Products and Services (Apr. 27, 1997) CCH NASAA Reports 2191. As of mid-1988, 22 states had adopted a version of the safe harbor. 1 BLUE SKY L. REP. (CCH) 6481.

83 27 states had adopted a version of the NASAA policy as of February, 2000. Broker-dealers, investment advisers, broker-dealer agents ("BD agents") and investment adviser representatives or associated person ("IA reps") who use the Internet to distribute information on available products and services directed generally to anyone having access to the Internet, and transmitted through the Internet, will not be deemed to be "transacting business" in the state if all of the following conditions are met:

A. The communication contains a legend clearly stating that:

(1) the broker-dealer, investment adviser, BD agent or IA rep may only transact business in a particular state if first registered, excluded or exempted from state broker-dealer, investment adviser, BD agent or IA rep requirements, as the case may be; and

(2) follow-up, individualized responses to persons in a particular state by such broker-dealer, investment adviser, BD agent or IA rep that involve either the effecting or attempting to effect transactions in securities or the rendering of personalized investment advice for compensation, as the case may be, will not be made absent compliance with the state's broker-dealer, investment adviser, BD agent or IA rep requirements, or pursuant to an applicable state exemption or exclusion; and

a. for information concerning the licensure status or disciplinary history of a broker-dealer, investment adviser, BD agent or IA rep, a consumer should contact his or her state securities law administrator.

B. The Internet communication contains a mechanism, including without limitation technical "firewalls" or other implemented policies and procedures, designed to ensure that prior to any subsequent, direct communication with prospective customers or clients in the state, the broker-dealer, investment adviser, BD agent or IA rep is first registered in the state or qualifies for an exemption or exclusion from such requirement. (This provision is not to be construed to relieve a broker-dealer, investment adviser, BD agent or IA rep who is registered in a state from any applicable registration requirement with respect to the offer or sale of securities in such state);

C. The Internet communications shall not involve either effecting or attempting to effect transactions in securities, or the rendering of personalized investment advice for compensation, as the case may be, in such state over the Internet, but shall be limited to the dissemination of general information on products and services.

D. Prominent disclosure of a BD agent's or IA rep's affiliation with a broker-dealer or investment adviser is made and appropriate internal controls over content and dissemination are retained by the responsible persons.

84 *See, e.g., Grutowski v. Steamboat Lake Guides & Outfitters, Inc.* 1998 WL 9602 (E.D. Pa.), ___ F. Supp. 2d _____; *McDonough v. Fallon McElligott, Inc.,* 40 U.S.P.Q.2d 1826 (S.D. Cal. 1996); *IDS Life Insurance Co. v. Sun America, Inc.,* 1997 W.L. 7286 (N.D. Ill. 1997). These cases reject general jurisdiction over a defendant based on advertising on the Web, where the matters complained of had nothing to do with the Web presence or the advertising. In *California Software, Inc. v. Reliability Research, Inc.,* 631 F. Supp. 1356 (C.D. Cal. 1986), defendants wrote messages to several California companies via a bulletin board and communicated with three California residents via telephone and letters, allegedly denigrating plaintiffs' right to market software. The Court held that general jurisdiction could not be based on the "mere act of transmitting information through the use of interstate communication facilities," where defendant had no

offices in California and did not otherwise conduct business there except to communicate with California users of the national bulletin board; 631 F. Supp. at 1360 (The court did find specific jurisdiction). In *Panavision International, L.P. v. Toeppen,* 938 F. Supp. 616 (C.D. Cal. 1996), the federal court rejected general jurisdiction in California over an Illinois defendant who used a California company's trademark in a website address in order to compel the plaintiff to buy out his domain rights.

85 *Mieczkowski v. Masco Corp.,* 997 F. Supp. 782 (E.D. Tex. 1998).

86 *Chiaphua Components Limited v. West Bend Company,* 95 F. Supp. 2d 505, 512 (E.D. Va., Norfolk Div., 2000).

87 *Supra,* note 31, and accompanying text.

88 51 F. Supp. 2d 707, 712 (E.D. Va., Alex. Div. 1999).

89 15 U.S.C. §1125.

90 Porsche Cars North America Inc. v. allporsche.com, 215 F.3d 1320 (decision not published), 55 U.S.P.Q.2d 1158 (4th Cir. 2000).

91 *Caesars World, Inc. v. Caesars-palace.com,* 200 U.S. Dist. LEXIS 2671 (E.D. Va., March 3, 2000).

92 *Lucent Technologies, Inc. v. Lucentsucks.com,* 95 F. Supp. 528 (E.D. Va., Alex. Div. 2000).

93 INTL. HERALD -TRIBUNE (May 29, 2000), 7. *See also* notes 1-2 *supra* and accompanying text.

94 Scottish Daily Record (Apr. 13, 2000) 41, 2000 WL 17093040.

95 *Id.*

96 *Id.*

97 David Hearst, *Yahoo! Faces French Fines for Nazi Auctions,* GUARDIAN (July 24, 2000), 2000 WL 24265519.

98Address to American Bar Association National Institute on *International Ventures in the Old and New Economies,* San Francisco (November 16, 2000).

99 Quoted in William Peakin, *Cyberspace Threat to Wipe Out French Sovereignty Over Nazi Loot.* THE SUNDAY HERALD [London] (Aug. 6, 2000), 4, 2000 WL 23171818.

100 *Id.*

101 *Winfield Collection Ltd. v. McCauley,* (E.D. Mich., No. 99-CV-75875-DT, July 24, 2000.

102 *Zippo Mfg. Co. v. Zippo Dot Com, Inc.,* 952 F. Supp. 1119 (W.D. Pa. 1997)

103 *The Economist,* London (Oct 24, 1997).

104 Release No. 33-7516, note 21.

105 *See* ACHIEVING LEGAL AND BUSINESS ORDER IN CYBERSPACE: JURISDICTIONAL ISSUES CREATED BY THE INTERNET [Report by the American Bar Association ("ABA") Jurisdiction in Cyberspace Project, ABA Annual Meeting in London July 17, 2000] (hereafter "Jurisdiction Project Report"). The author served as Chair of the Working Group on Securities for this Project.

106 Jurisdiction Project Report at 33-34. The change may also affect default rules in connection with applicable law. In Switzerland, for example, a contract is subject to the law of the state with which it is most closely connected, presumed to be the ordinary residence of the party called upon to provide the characteristic performance, *i.e.,* the seller. But to the extent that the buyer through a super-intelligent bot defines its purchase, activates delivery, etc., its control may surpass that of the seller, resulting in the use of the law of the buyer's residence. The Rome Convention also mandates use of the law of the country with which the contract is most closely connected, presumed to be the habitual residence of the party who is to effect the performance characteristic of the contract. Article 4.

107 What should be deemed to constitute "targeting" is a subject that needs a global consensus. *See* subsection 4., *infra,* regarding the creation of a Global Online Standards Commission.

108 A consumer's "bot" should be defined as one to which no criteria were applied except those explicitly specified by the consumer, *i.e.,* a "fiduciary" bot.

109 For example, the Global Business Dialogue Hague Conference on Private International Law, the Internet Law and Policy Forum, The International Chamber of Commerce, the United Nations Commission on International Trade Laws ("UNCITRAL"), the World Intellectual Property Organization ("WIPO"), the World Trade Organization ("WTO") and others are studying jurisdiction issues in cyberspace. Moreover, the Committee of Experts on Crime in Cyberspace of the Council of Europe released a draft treaty that would require all participating nations to adopt new laws requiring government access to encrypted information, expanding copyright and criminalizing possession of common security tools (**http://conventions.coe.int/treaty/en/projects/cybercrime.htm**). The Global Internet Project has issued recommendations for businesses and organizations to follow and measures for governments to consider regarding cybercrimes (**http://www.gip.org/pr20000J16a.htm**)

110 *See EU proposed Web tax,* CNN Financial Network, June 8, 2000 (**http://cnnfn.com/2000/06/08/europe/eu_vat/**).

Cyberspace Law Committee